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May 9, 2011

By E-Mail and First Class Mail

Docket Coordinator, Headquarters
U.S. Environmental Protection Agency
CERCLA Docket Office
(Mail Code 5305T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: National Priorities List, Proposed Rule No. 54 - EPA-HQ-SFUND-2011-0074
New Cassel/Hicksville Ground Water Contamination; Proposed NPL Listing

Dear Sir or Madam:

This firm represents Arkwin Industries, Inc., with regard to the referenced matter. We attach hereto a Comment, opposing the listing of the New Cassel/Hicksville Ground Water Contamination ("NCHGWC") Site on the National Priorities List ("NPL"), submitted by the following entities and individuals particularly located in the New Cassel Industrial Area ("NCIA"), through and by their undersigned legal counsel:

(1) Garfunkel Wild, P.C., representing Arkwin Industries, Inc.; (2) Farrell Fritz, P.C., representing Grand Machinery Exchange, Inc. and 2632 Realty Development Corp.; (3) Sheehan Phinney Bass & Green, P.A., representing IMC Eastern Corp. (f/k/a IMC Magnetics Corp.); (4) Epstein Becker & Green P.C., representing Island Transportation Corporation; (4) McCarthy Fingar LLP, representing Tishcon Corp.; (5) Nixon Peabody, representing C & O Realty Co.; (6) Bond, Schoeneck & King PLLC, representing Barouh Eaton Allen Corp.; (7) Robinson & Associates, P.C., representing Atlas Graphics, Inc., and H.D.P. Printing Industries Corp.; (8) Kevin Maldonado & Partners PLLC, representing Next Millennium Realty, LLC, 101 Frost

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Street Associates, L.P., 101 Frost Street Corporation, and 101 Frost Street Association, L.P.; (9) Certilman, Balin, Adler & Hyman, L.L.P., representing Equity Share 1 Associates; and (10) Sahn Ward Coschignano & Baker, PLLC, representing Utility Manufacturing Co., Inc., and Nest Equities, Inc.

Summary of Attached Comment

In summary, the submitting parties oppose inclusion of the NCHGWC site on the NPL, first because the area delineated by EPA for inclusion is overly broad, and ignores literally decades worth of analysis and data conducted by the New York State Department of Environmental Conservation ("NYSDEC") and others showing that what is proposed to be listed by EPA as a single site is actually comprised of at least three distinct and separate plumes of groundwater contamination, each from separate and distinct sources, a fact previously asserted by the NYSDEC itself. In fact, we aver that, but for the inclusion of the more upgradient and eastern sources in the proposed listing, the NCIA itself would not be eligible for EPA listing, and that the EPA is now, in effect, unfairly "boot-strapping" the smaller, less contaminated NCIA into an unmanageably broader area dominated by larger, more environmentally complex sites.

As set forth more fully in the Comment, by proposing to list the vast NCHGWC as a single NPL site, EPA undermines the applicability and integrity of its own Hazardous Ranking Score ("HRS") system, and risks frustrating the very purposes of an NPL listing. Moreover, EPA's proposed treatment of the NCHGWC site as a single NPL site will undoubtedly engender delay and excessive and duplicative study costs. Anticipated challenges to the single-site approach proposed by EPA, from parties or groups of parties contending that there is divisibility of harm, will only hamper the already decades-old cleanup of the contaminated groundwater in the area.

Further, the proposed listing is fundamentally flawed in its reliance upon an abstract HRS that is uninformed by the facts relating to the actual environmental risk posed by the contamination at the site. Indeed, the submitting parties respectfully assert that the NCHGWC site does not qualify for the NPL, as there is no current or future risk to public health. Accordingly, the expenditure of scarce federal Superfund dollars on a site where there is no imminent public risk is contrary to the stated purposes of CERCLA and the National Contingency Plan.

Finally, the submitting parties are all defendants in a litigation, *State of New York, et al. v. Next Millennium Realty, L.L.C., et al.*, Civ. 03-5985 (SJF)(MLO), described more fully in the attached Comment, wherein the State of New York seeks to recover the costs of the efforts that have been undertaken since the late 1980's to remediate environmental contamination at the NCIA. The defendants moved for summary judgment dismissing the State's cost recovery action based upon the expiration of the statute of limitations. The United States District Court for the Eastern District of New York, by the Report and Recommendation of the Magistrate Judge assigned to the litigation, agreed with defendants and *has recommended dismissal of the entire*

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*State action.*¹ It was only once the motion was fully briefed and the outcome concerning the likely decision was clear that, for the first time in twenty-plus years since the State environmental investigation was commenced, that the State indicated that the site would be nominated by the State to the NPL. Simply stated, the Court's dismissal of the State's cost recovery action should not be a factor considered in a determination to list a site on the NPL.

Furthermore, the New York State Department of Health has advised that there is no known exposure to the public or threat to human health and safety. Accordingly, in sites such as this where there is no threat to the public health, it is respectfully submitted that EPA has a duty to consider economic factors. This duty originates from the responsibility of EPA to direct federal funds to other sites that have greater priority based upon the threat they pose to the public health. EPA should weigh the economic factors in its decision to list the site, and refrain from spending scarce federal Superfund dollars and EPA resources that may be better spent on a site with actual human health and safety risks.

EPA should also give due consideration to the negative economic impacts and chilling effect to positive development that may result from an ill-advised designation of the area as a federal Superfund site. The State of New York in March 2006 designated the NCIA as an Empire Zone (Nassau County Empire Zone Area 4) specifically to encourage much needed investment and job growth in this long depressed area. The unwarranted labeling of the NCIA as a federal Superfund site will undoubtedly stifle these worthy economic development goals without providing any countervailing benefit to public health or the environment.

For the reasons set forth in the attached Comment, the submitting parties respectfully urge EPA to reconsider whether the current proposed listing of the NCHGWC site on the NPL, as set forth in the proposed rule, is actually necessary to protect human health and the environment, and is consistent with the results of decades of study and data already conducted and gathered regarding the site. The submitting parties assert that it is not, and that the NCHGWC site should not be listed on the NPL. We thank you in advance for your careful consideration of the attached Comment and its Exhibits in rendering your determination as to whether to list the NCHGWC site on the NPL.

Respectfully submitted,



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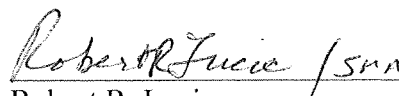
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¹ The parties are currently awaiting the decision of the District Court Judge regarding the adoption of the Magistrate's recommendation of dismissal.



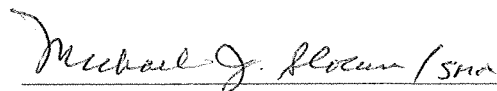
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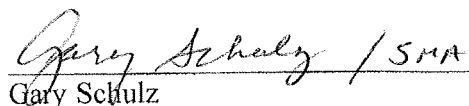
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**COMMENT TO PROPOSED EPA LISTING OF THE
NEW CASSEL/HICKSVILLE GROUNDWATER CONTAMINATION
SITE TO THE SUPERFUND NATIONAL PRIORITY LIST**

This Comment is submitted by the following entities and individuals, through and by their respective legal counsel:

- (1) Garfunkel Wild, P.C., representing Arkwin Industries, Inc.;
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- (9) Kevin Maldonado & Partners PLLC, representing Next Millennium Realty, LLC, 101 Frost Street Associates, L.P., 101 Frost Street Corporation, and 101 Frost Street Association, L.P.;
- (10) Certilman, Balin, Adler & Hyman, L.L.P., representing Equity Share 1 Associates; and
- (11) Sahn Ward Coschignano & Baker, PLLC, representing Utility Manufacturing Co., Inc. and Nest Equities, Inc.

SITE HISTORY

The New Cassel/Hicksville Ground Water Contamination ("NCHGWC") site (EPA ID: NY0001095363) that the EPA has proposed to list on the federal Superfund National Priorities List includes areas of Hicksville, New Cassel, Westbury, Hempstead and Salisbury, which are contained in the Towns of Hempstead, North Hempstead, and Oyster Bay, Nassau County, New York. The area consists of industrial, commercial, and residential properties. The New York State Department of Environmental Conservation ("NYSDEC") has spent more than 20 years investigating and engaging in remediation activities at the NCHGWC, and, in particular, has overseen the work undertaken by individual potentially responsible parties ("PRPs") to address ground water contamination at the New Cassel Industrial Area ("NCIA"), the area which is located north of the Bowling Green public water supply wells. It is these public water supply wells where the presence of volatile organic compounds ("VOCs") was initially detected. Several wells in Hicksville have also shown the presence of VOCs. However, both the Bowling Green wells and the Hicksville wells are being safely and comprehensively treated to insure the removal of VOCs from any water consumed by the public.

A. Remedial Activities At NCIA Have Eliminated The Threat Of Public Exposure And Potential Risk To the Public

The NCIA is comprised of approximately 170 acres of industrial and commercial properties, bounded by the Long Island Railroad, Frost Street, Old Country Road, and Grand Boulevard in North Hempstead, Nassau County, New York. The NCIA lies above the Upper Glacial and Magothy aquifers. While the submitting parties do not contest that groundwater beneath the NCIA contains VOCs, the only nearby source of drinking water, the Bowling Green Water District ("BGWD") well heads, are being remediated by a fully operational redundant treatment system, thus eliminating any risk of public exposure. These remediation systems have been in place for several decades.

In August 1988, NYSDEC added the 170-acre NCIA to New York State's Registry of Inactive Hazardous Waste Sites (the "State Registry") as one single site. The classification given to the NCIA site at the time of its listing in 1988 by the NYSDEC indicated that NYSDEC believed there was a significant threat to public health and the environment posed by the contamination found at, and presumably being released from, the NCIA site. In 1989, the BGWD hired Dvirka & Bartilucci Consulting Engineers, ("D&B"), to recommend a long-term treatment option for remediating groundwater contamination migrating to the Bowling Green public drinking water supply wells from upgradient sources. In accordance with D&B's recommendation, in 1990, a granular activated carbon adsorption system ("GAC System") was constructed at BGWD Supply Well No. 1 and Well No. 2 and placed into service. Construction of the GAC System was completed by December 10, 1990. The GAC System was constructed to permanently address the contamination and it remains in use to this date.

In March 1995, the NYSDEC de-listed the entire 170-acre NCIA site from the State Registry. At the same time, NYSDEC listed several individual properties located in the NCIA on the State Registry. On May 16, 1995, NYSDEC held a public meeting concerning the continued presence of contamination at the NCIA. At the meeting, NYSDEC officials informed representatives of the BGWD and the Town of Hempstead that the recovery of the cost of the

construction and operation of the GAC treatment system would be pursued by NYSDEC against the parties responsible for the contamination at the NCIA. In addition, NYSDEC assured these officials that NYSDEC would fund supplementary remedial systems for this contamination.

Based on NYSDEC's assurances, in May 1995, BGWD again hired D&B to supplement the GAC System. D&B recommended installation of an approximately thirty-foot air stripping tower to supplement the remediation being done by the already constructed and operating GAC System. Physical on-site construction of the air stripping tower, which began on June 12 and 13, 1995, continued into July 1995. NYSDEC reimbursed BGWD for the capital costs associated with drilling the soil borings and installing the air stripping tower. The air stripping tower continues to be used to this day in conjunction with the GAC System as the remedial technique for the groundwater contamination, and ensures compliance with the drinking water standards for all water distributed to the public. In addition, early warning monitoring wells were installed at two locations upgradient of the BGWD supply wells to provide advance warning of contamination migrating towards the supply wells. As a result, the remedial activities taking place at the BGWD supply wells are successfully preventing any contaminants in the groundwater from entering the public drinking water supply. There is no actual exposure pathway or potential risk to the public. In addition, no private water supply wells have been identified in the vicinity of the NCHGWC site. Finally, the remedial system (the supplemental air stripper and the GAC System) already in use for several decades is expected to be continued to be used at the BGWD supply wells to prevent future public exposure to groundwater contaminants from the drinking water supply.

B. Remedial Activities At Individual Sites Within The NCIA Have Further Eliminated The Risk Of Harm To The Public From Environmental Contamination Present At Any Individual Site

Extensive study, testing, and remediation work has been completed by the submitting parties at individual sites within the NCIA, resulting in "no action" or equivalent letters from NYSDEC, or the delisting of individual sites within the NCIA, thus indicating complete source removal, as follows:

1. **Site No. 1-30-043U: 36 Sylvester Street** - The owner of the site, Grand Machinery Exchange, Inc., entered into an Order on Consent with the NYSDEC in or around March 2000 for 36 Sylvester Street (Index # W1-0863-00-01) to conduct a remedial investigation and feasibility study. In addition, pursuant to the Order on Consent, the owner conducted an interim remedial measure removing material from an on-site dry well. VOCs detected in on-site groundwater were attributed to two upgradient sites. A Record of Decision ("ROD") was issued for this site in March 2003 specifying that no further work was needed. The site was delisted from the State Registry in September 2003. *The site carries an administrative classification code of "C", which means that the NYSDEC determined that all remediation is completed, that all operation, maintenance and monitoring requirements have been met and the site has been delisted from the State Registry.*

2. **Site No. 1-30-043H: 700-712 Main Street** - An Interim Remedial Measure (“IRM”) from September 2001 through December 2002, was performed at the NCIA property located at 700 Main Street, Westbury, New York, owned by Nest Equities, Inc. and operated by Utility Manufacturing Co. The IRM involved the installation of two air sparge points, two clustered soil vapor extraction wells, and a multi-depth clustered monitoring well. An air compressor, regenerative blower, and carbon units were installed in an equipment container located on the property. The air sparging/soil vapor extraction system (“AS/SVE”) operated from November 15, 2001 until December 19, 2002. In accordance with the IRM Work Plan, operation of the AS/SVE system ceased after collection of the fourth quarter 2002 round of groundwater monitoring. *The results of three years of post-remediation monitoring confirmed that the groundwater remediation program was successful and that the on-site groundwater treatment system remediated the VOC contamination below the site.*
3. **Site No. 1-30-043E: 30-36 New York Ave and 30-33 Brooklyn Ave; Site No. 1-30-043W: 29 New York Ave.** – Tishcon Corporation entered into an Order on Consent, #W1-0799-98-02, with New York State for, *inter alia*, remediation related to a former owner’s use of a cesspool at 30-36 New York Avenue and 31-33 Brooklyn Avenue, Westbury, NY. Remediation activities, including on-site AS/SVE, have been in continuous operation from January 2000 until September 2008, except for short shut downs for maintenance and repair of the systems. *Remediation efforts have been effective in removing contamination both on and off site as indicated by regular monitoring well sampling. Sampling was discontinued pursuant to criteria under the Consent Order in the third quarter of 2009.* Requests to reclassify the site from class 2 to class 4 on the NYSDEC Registry have not been responded to since at least 2009.
4. **Site No. 1-30-043C: 125 State Street** – Tishcon Corporation entered into Orders on Consent WI-0757-95-05 and WI-0757-98-02 with regard to this one acre parcel, formerly owned by C&O Realty Corp., located in the center of the NCIA. Tishcon Corporation was a tenant in this location from 1984 to 1996. Tishcon produced dietary supplements and vitamin products in the form of powders and tablets. VOCs and metals were detected in storm drains at the site. *The excavation and restoration of the storm drains was completed in October 1997.*
5. **Site No. 1-30-043P: 118-130 Swalm Street** – Owned by Barouh Eaton Allen Corp., in March 2004, the DEC issued a ROD for this site selecting a remedy of “No Action with continued groundwater

and soil vapor monitoring” and found that, “[t]his site does not present a current or potential threat to public health or the environment.”

6. **Site No. 1-30-043D: 648, 656, 662, 670 Main St. & 66 Brooklyn Ave** – This site, owned and/or operated by Arkwin Industries, Inc., comprises approximately four acres and five separate buildings in the central part of the NCIA. Based on the discovered presence of VOCs and petroleum hydrocarbons discovered in the soils and groundwater at the site, Arkwin was added as a Class 2 site in 1995. The contaminated soil was excavated in June 1997 as part of an IRM. *A “No Action” ROD for OU-1, On-Site Soil, was issued in January 1998. A focused RI/FS for the on-site groundwater (OU-2) was subsequently conducted, which indicated the presence of VOCs and their breakdown products above groundwater standards in the Upper Glacial and Magothy aquifer. An AS/SVE was chosen by the DEC as the selected remedy for the groundwater. The ROD for OU-2 was issued in December 1999. The AS/SVE system began continuous operation in December 2002 and was approved by the DEC for shutdown in or around October, 2007. No further action has been required by DEC. Arkwin is currently petitioning for de-listing.*
7. **Site No. 1-30-043A: 570 Main Street** - Pursuant to Orders on Consent entered into with NYSDEC in 1996, 1998 and 2001, IMC Eastern Corp. f/k/a IMC Magnetics Corp., operated a soil vapor extraction (“SVE”) system at 570 Main Street, Westbury, New York from 1997 through 2003 to remediate soils at the site. In 2001 IMC also performed in-situ chemical oxidation to address groundwater. *IMC has requested that NYSDEC provide notice pursuant to the 2001 Order on Consent that work has been completed.*
8. **Sites 10043I, L and M, Frost Street Sites** - Pursuant to three Orders on Consent, the Frost Street Parties have removed contaminated soils and operated soil vapor extraction and air sparging systems (“SVE/AS”) at the Frost Street Properties. *The SVE/AS systems have established source area control and removal of significant VOC mass. The SVE/AS continue to operate at the Frost Street Properties.*

C. Remedial Activities At Sites Upgradient Of The NCIA Have Also Eliminated The Risk Of Harm To The Public From Contaminated Groundwater Flowing Onto The NCIA From Upgradient Sources

The General Instruments Corp. Site (the “GIC Site”) and the former Sylvania Site (the “Sylvania Site”) are both listed on the State Registry. These sites are located upgradient from

the NCIA. In addition, NYSDEC recently listed Sulzer Metco as a NYS Superfund Site and continues to identify other PRP's as upgradient sources of contaminants migrating toward the NCIA. Many of these upgradient facilities have documented spills and releases of chlorinated VOCs, and the fact that contaminated groundwater is emanating from these facilities has been documented.

As for the facilities upgradient of the NCIA, the GIC Site, for example, was used as a research and design laboratory and a manufacturing facility that produced semiconductors, radar systems, and electronic equipment. VOC contamination at the GIC Site resulted from a leaking underground waste solvent tank and a sulfuric acid spill. The leaking underground tank and contaminated soils were removed and an in-situ acid neutralization injection/treatment system was developed to remediate the sulfuric acid spill. At the GIC Site a full-scale system, including three ultra-violet B ("UVB") wells, was installed in the summer of 2004 to remediate the VOC contamination in the groundwater. Operation of these three circulation wells began on July 15, 2004. A total of 789 pounds of VOCs were removed by the groundwater circulation well system between July 15, 2004 and February 25, 2005.

The Sylvania Site was used for the production of nuclear fuel rods in the 1950s and 1960s. Drums containing trichloroethylene ("TCE") and tetrachloroethylene ("PCE") were discovered in the ground in 1986 during an excavation undertaken in preparation for the construction of a building extension. During the subsequent investigation of the site, a soil vapor study showed that VOCs, including PCE and TCE, were present in the soil gas and VOCs, including trichloroethane, ("TCA"), PCE, and TCE, were detected in the groundwater. The southern boundary of the Sylvania Site is immediately adjacent to the northern boundary of the GIC Site. As a result, the on-site and off-site wells installed as part of the work done for the GIC Site serve as downgradient monitoring points for the Sylvania Site. Approximately 57 drums and 80 to 90 cubic yards of contaminated soil were removed from the Sylvania Site as part of the initial remediation efforts. In 2004, additional soils impacted by uranium, thorium, nickel, and PCE were removed.

Since the Sylvania Site and the GIC Site are upgradient of both the remedy in place at the BGWD (GAC System and supplemental air stripper) and the early warning monitoring wells installed for the BGWD supply wells, contaminants in the groundwater coming from the GIC and Sylvania Sites toward the BGWD supply wells would be detected prior to entering the public drinking water supply and would be removed by the wellhead treatment already in place.

**D. Procedural History Of Litigation Commenced By NYSDEC
And Others Related To The Remediation Of The NCIA
And Surrounding Areas, Including Off-Site Groundwater**

On March 13, 2006, the State of New York and the Commissioner of NYSDEC commenced an action entitled *State of New York, et al. v. Next Millennium Realty, L.L.C., et al.*, Civ. 03-5985 (SJF) (MLO) (the "State Action") in the United States District Court for the Eastern District of New York against several parties associated with sites located in the eastern portion of the NCIA that the State claimed were responsible for the release of contamination and sought to recover: (1) costs under §107 of CERCLA for the completion of the remediation of groundwater contamination emanating from the NCIA and contaminating the BGWD public

water supply wells; (2) injunctive relief to abate the groundwater contamination emanating from the NCIA and for reimbursement of the State's costs in abating a public nuisance under New York common law; (3) restitution; and (4) indemnification. On May 24, 2006, the State Action was consolidated with an action previously commenced by Next Millennium and 101 FSA, under Index Number 03-CV-05985, against certain entities that had conducted manufacturing activities at sites owned by Next Millennium and 101 FSA located in the NCIA.

On May 12, 2006, the State amended its Complaint to add certain additional parties to this action. The additional parties named in the Amended Complaint were claimed by the State to be associated with sites located in the central portion of the NCIA and the State claimed they were responsible for the release of contamination. Thereafter, the parties associated with the central and eastern portion of the NCIA moved, pursuant to Fed. R. Civ. P. ("FRCP") Rule 12(b)(6), to dismiss the State's Amended Complaint. In their motion to dismiss, these parties contended, among other things, that the State's CERCLA and common law nuisance claims were time-barred based upon the applicable statutes of limitations. The Court, in the Report and Recommendation of Magistrate Judge Michael L. Orenstein dated February 15, 2007 (the "2007 Report and Recommendations"), determined that the part of the motion seeking dismissal of the CERCLA claim could not be resolved on the record submitted to the Court and further directed the parties to engage in discovery on the threshold issues regarding the time and manner of the State's recovery actions. The 2007 Report and Recommendation was accepted in its entirety by Order of the United States District Court Judge Sandra J. Feuerstein dated August 14, 2007. (That order dismissed the State's common law claim of nuisance as being time-barred.)

On May 20, 2008, the State filed the Second Amended Complaint, adding additional parties. The additional parties named in the Second Amended Complaint were claimed by the State to be associated with sites located in the western portion of the NCIA and the State claimed that they also were responsible for the release of contamination.

Beginning in October 2009, the defendants filed and/or joined in a motion for summary judgment seeking dismissal of the State's CERCLA claim on statute of limitations grounds and seeking dismissal of the remaining pendent State law claims. The defendants argued that the installation of the GAC system in 1990 and the supplemental air stripping tower, which construction commenced on June 12 and 13, 1995, at the BGWD were remedial actions, and that these actions triggered the statute of limitations. As the State had waited well in excess of six years to assert the CERCLA claim, it was time-barred.

On September 24, 2010, United States Magistrate Judge Michael Orenstein, for the U.S. District Court, Eastern District of New York, issued his Report and Recommendation (the "2010 Report and Recommendation"). Magistrate Orenstein reported and recommended that the Court grant defendants' motion for summary judgment, which recommendation, if adopted, would result in the dismissal of all federal claims. In addition, the Magistrate Judge reported and recommended that the Court decline to retain jurisdiction over Plaintiffs' remaining state law claims. As of the date of this writing, the District Court Judge has not yet issued an Order based on the 2010 Report and Recommendation.

It is noteworthy that it was only after the State realized that its CERCLA claim faced dismissal on timeliness grounds, that the State and its NYSDEC began to petition EPA to list the

NCHGWC site on the NPL. The State's failure to timely commence its litigation, however, is insufficient justification for EPA to list the site on the NPL. Indeed, as set forth in detail below, EPA should refrain from doing so.

**THE PROPOSED LISTING IS EXCESSIVELY
BROAD AND FAILS TO CONSIDER THE PREVIOUSLY
DEVELOPED DATA THAT SHOWS MULTIPLE PLUMES**

As described above, there have been extensive and decades-long studies and remediation efforts undertaken by NYSDEC and the submitting parties, amongst others, at the NCHGWC site. The proposed listing of the NCHGWC site as comprising a single, unitary area of contamination from a single plume should be rejected because it ignores the enormous amount of previously collected data and analyses demonstrating that the area delineated by EPA is excessively broad and in fact consists of multiple, distinct plumes.

By taking an overly simplistic approach and asserting, contrary to the available scientific evidence, that the proposed NCHGWC site is impacted by a single, massive plume, EPA has undermined the applicability and integrity of its HRS system, and threatens to defeat the very purposes of an NPL listing. According to EPA, the purposes of listing a site on the NPL are to (1) determine "which sites warrant further investigation to assess the nature and extent of human health and environmental risks associated with the site"; (2) identify "what CERCLA-financed remedial actions may be appropriate"; (3) notify "the public of sites EPA believes warrant further investigation"; and (4) serve "notice to potentially responsible parties that EPA may initiate CERCLA-financial remedial action."

In particular, the NCIA, has been studied extensively for more than 25 years. Those studies demonstrate that there are three separate plumes emanating, at least in part, from beneath the NCIA, **none of which have any reported impact on the western-most and eastern-most public supply wells sampled and utilized as the basis for EPA's HRS for the entire NCHGWC site**, which (as proposed) extends from Hempstead to Hicksville/Levittown, New York.

In fact, had the EPA properly evaluated the situation, the NCIA itself would not be eligible for EPA listing. It was only through EPA's improper "boot-strapping" of the smaller, less contaminated NCIA groundwater plumes with the broader contamination emanating from other larger, more environmentally complex sites that it was able to manipulate the HRS. The operational history and consequent waste contamination generated by the upgradient parties, Sylvania, General Instruments, Sulzer Metco and others, includes constituents which are most certainly distinguishable from the VOCs originating in the NCIA, the remediation of which will differ vastly as well.¹ Furthermore, cleanup of the Sylvania Site falls under the Formerly Utilized Sites Remedial Action Program ("FUSRAP"), which is regulated by the U.S. Army Corps of Engineers ("USACOE"). Instead of effecting a more efficient global cleanup as the EPA has said it hopes to achieve by its amalgamation of the broad NCHGWC area, remediation

¹ Remediation of the upgradient sites will be more complicated as a result of the presence of these different contaminants including, for example, radioactive waste.

will more than likely lag as reviews and approvals by multiple agencies will be required before even the slightest step forward can be taken.

In short, the NCIA does not require the further investigation that would result from an NPL listing, as it has been extensively studied for years, as described above. Although the HRS system is not designed to give a complete picture of potential NPL sites, it is nonetheless a step in establishing EPA's priorities. But there is no need for EPA to commission new studies to determine what is already known – that there are separate, distinct and divisible plumes within the vast area of the proposed NCHGWC Site that need not be studied further to determine the area impacted. To lump the entire proposed area into a single NPL site through the demonstrably incorrect assertion that the impacts throughout the site are caused by a single plume of unknown origin does not serve the interests of the public, the EPA, or the potentially responsible parties. If the ultimate goal of CERCLA is “to promote prompt cleanup of hazardous waste sites,” the proposed listing will frustrate that goal, since it will engender nothing but delay, and excessive and unnecessary study costs.

In addition, the oversimplified approach to listing the NCHGWC site as a whole will likely result in numerous challenges by parties or groups of parties on the grounds that there is divisibility of harm, pursuant to *Burlington Northern v. United States*, 129 S.Ct. 1870 (2009), further delaying any remedial action. *Burlington Northern* clearly contemplates apportionment when “there is a reasonable basis for determining the contribution of each cause to a single harm.” 129 S.Ct. at 1881 (quoting Restatement (Second) of Torts §433A(1)(b), p. 434 (1963-1964)). The Supreme Court recognized that one of the bases for apportionment is the percentage surface area of the site. The existence of separate plumes clearly falls within the bases for apportionment accepted by the Supreme Court. Parties in areas that have been thoroughly studied cannot be responsible for studies in areas in which it has already been established that they have no impact. Accordingly, challenges to any study costs incurred by EPA will be raised by those parties, consistent with *Burlington Northern*, further delaying the remediation of the proposed site.

In sum, the EPA should withdraw the proposed listing and conduct new scoring pursuant to the HRS system for the known, separate areas. If that scoring provides the basis for proposed listings of distinct areas of contamination, those areas can be addressed appropriately and efficiently, without subjecting EPA and any identified PRPs to unnecessary study costs, and without further delaying the remediation of the contaminated groundwater at the site.

**THE PROPOSED LISTING IS FLAWED
IN THAT IT RELIES UPON AN ABSTRACT
HRS THAT IS UNINFORMED BY THE FACTS
RELATING TO ACTUAL ENVIRONMENTAL RISK**

A full evaluation of the risk to public health in the NCHGWC site should be made by the EPA when determining priority sites. Fundamental to CERCLA and the NCP is the concept that scarce federal dollars and resources be directed to priority sites based upon actual risk to the public health. This general concept has been incorporated into the HRS system.

The proposed listing is flawed in that it apparently relies upon an abstract HRS that is uninformed by the actual facts relating to environmental risk. An informed analysis that considers the remedial actions already in place reveals that the NCIA, and potentially the remainder of the proposed NCHGWC site, do not qualify for the NPL as there is no current or future risk to public health. As noted above, both CERCLA and the NCP contemplate that Superfund dollars should be spent on sites where there is a priority need to protect health and safety. Any large expenditure of Superfund dollars at the NCIA, where no public health risk exists, and potentially the rest of the NCHGWC site, is not an informed use of scarce Superfund dollars, and it is inconsistent with NCP and the spirit of the HRS system.

The HRS, (40 CFR 300, App. A.), is the primary screening tool used to determine if a hazardous waste site should be placed on the NPL. The scoring system is designed to identify sites that warrant a remedial investigation/feasibility study ("RI/FS") and risk assessment ("RA") to determine if they pose risks to public health or the environment, and remedial action if necessary according to the NCP. The original HRS system was adopted in 1982 to evaluate the relative threat of a site over five pathways (groundwater migration, surface water migration, air migration, direct contact and fire/explosion). The EPA revised the HRS system in 1990 in response to Superfund Amendments and Reauthorization Act of 1986 ("SARA"), retaining the same cutoff score and basic approach as the original HRS system while incorporating SARA requirements and improvements identified by the EPA and the public.

The HRS system numerically screens sites using information typically obtained during the limited initial investigations conducted at a site (*i.e.*, preliminary assessment and site inspection). The available site information enables the assessor to screen the relative risk of a site based on this limited data. The process assumes limited data and it assumes that the major NCP milestones of an RI/FS, and RA, a ROD and remedial action have not yet been reached. During HRS scoring, numerical values are assigned to the following factors which relate to risk-based conditions at the site:

- likelihood that a site has released or has the potential to release hazardous substances into the environment;
- characteristics of the waste (toxicity and waste quantity);
and
- targets (people and sensitive environments) affected by the release.

The revised HRS system assesses target populations and sensitive environments by giving greater weight in all pathways to those exposed to documented contamination (especially those who are exposed to contamination above health-based benchmarks) than to those who may be potentially exposed. A practical, objective use of the HRS system demands full information on “target” exposure.

Here, the NCHGWC site scoring evaluation must be limited to the groundwater migration pathway. There is no suggestion of exposure to soil contamination and no air migration associated with groundwater contamination. The surface water migration pathway is also not a concern, since there are no surface water bodies in the vicinity. The groundwater migration pathway evaluation must consider the likelihood that hazardous substances will migrate and contaminate aquifers and any drinking water wells that draw on those aquifers. Where there is known groundwater contamination, the HRS system gives greater weight to the population whose drinking water is actually contaminated compared with those who may be potentially exposed.

Although the Upper Glacial and Magothy aquifers at the NCHGWC site are interconnected, there are differences between them. As noted in the October 2003 NYSDEC ROD for what the NYSDEC calls OU-3 (New Cassel Industrial Area Off-site Groundwater), the Upper Glacial aquifer is found from the surface to a depth of approximately 80 feet below ground surface. The Magothy aquifer is located beneath the Upper Glacial aquifer. The BGWD supply wells are screened in the Magothy aquifer (BGWD Well #1 is screened from 480 to 530 feet below ground surface and Well #2 is screened from 520 to 570 feet below ground surface).

Although these sister aquifers are contaminated, the well heads in the area are fully remediated with carbon filtration and/or air stripping. There is no reasonable possibility of exposure. Water district reports indicate that there has been no breakthrough contamination in the public water supply wells located within the NCHGWC site. The statutory mandate of the HRS system is to assess, to the maximum extent feasible, the relative degree of real risk to human health and the environment posed by sites under HRS system review, not abstract or theoretical risk that ignores these facts. **The relative degree of real risk to human health is zero.**

The EPA typically conducts HRS system scoring early in the site evaluation process based on limited data obtained during the preliminary site assessment and site inspection. If the HRS evaluation results in a high score and the site is listed on the NPL, the RI/FS and RA are conducted to determine the need for an appropriate type of remedial action that should be implemented to address the human health and environmental risks posed by the site.

The site investigation and remediation process at the NCHGWC site, particularly with respect to the NCIA portion, however, are *far* beyond the preliminary assessment/site inspection phase. Countless volumes of data have been collected during investigations conducted by many parties over the course of more than two decades that fully characterize the extent of contamination and the risks posed by groundwater contamination. Source removal and remediation actions have predominantly been completed at sites located with the NCIA. Although the extent of the groundwater contamination flowing from the NCIA may not be fully defined, it is unlikely that it will ever be fully defined, as the groundwater continues to migrate

laterally and with depth. The bottom line is that such delineation is unnecessary as a complete remedy is in place. An honest scoring of the site, and particularly the NCIA, should acknowledge that there is no exposure scenario.

It is important to note that the 1992 *Hazard Ranking System Guidance Manual, Interim Final* (page 31) states that “the scorer must realize that the HRS is a screening tool, not a detailed risk assessment.” Here, detailed information has been gathered that reveals the NCIA poses essentially no risk to human health and the environment. The HRS has no value as a “screening tool” if facts already known are ignored by EPA.

The October 2003 NYSDEC ROD for the NCIA Sites Off-site Groundwater, Section 5.3 (Summary of Human Exposure Pathways) states: “Ingestion of contaminated groundwater. **Since an active treatment system is in place that prevents the completion of this exposure pathway, no known completed exposure pathways exist . . .** A supplemental treatment system, air stripping followed by carbon polishing . . . mitigate the impact of the groundwater contamination on the Bowling Green water supply wells. Bowling Green water supply wells are routinely monitored for VOCs and other contaminants. To date, no site specific contaminants exceeding groundwater or drinking water standards were detected in water distributed to the public. Early warning monitoring wells have been installed south of Old Country Road, upgradient of the water supply wells as a precautionary measure. **Therefore, use of the groundwater in the area is not currently considered to be an exposure pathway of concern.**” See October 2003 NYSDEC Record of Decision for the New Cassel Industrial Area Sites Off-site Groundwater. (emphasis added).

Therefore, there can be no doubt that the groundwater exposure pathway has been successfully broken with sound remedial systems. Virtually all aquifers in New York have some contamination, and very few are on the NPL because the public is protected one way or another. The HRS, although an initial screening tool, certainly requires that these fundamental risk determinations and established risk controls be considered.

Indeed, according to the November 12, 2002 OSWER memorandum, *Guidelines for Withdrawing a Proposal to List a Site on the NPL (De-Proposal)*, a site being de-proposed generally should meet criteria similar to site deletion. The deletion provisions (40 CFR 300.425(e)) state that sites may be deleted from the NPL where no further response is appropriate. Further, in determining whether a site should be deleted, the EPA considers several factors, **including whether the remedial investigation has shown that the release poses no significant threat to public health or the environment**, and, therefore, taking remedial measures is not appropriate. Based on NYSDEC’s determination that the wellhead treatment system precludes the risk of exposure to NCHGWC site, the existing conditions meet one of the EPA’s stated criteria for **deleting** a site from the NPL. Under such circumstances, it cannot possibly be appropriate to include the NCIA within the proposed site.

In summary, EPA’s flawed HRS cannot be the basis for NPL listing of the NCHGWC site, since it ignores the actual existing conditions in the NCIA. Moreover, the numerous RI/FS and RA studies completed under NYSDEC supervision do not support this scoring, particularly with respect to the NCIA. Annexed hereto as Attachment A is a listing of sites where wellhead treatment at public supply wells has been chosen by EPA or NYSDEC as a component of the

selected remedy for sites where widespread plumes are being addressed. The existing conditions at the NCHGWC site match those where EPA and/or NYSDEC have accepted wellhead treatment as a final remedy addressing widespread groundwater contamination that impacts or has the potential to impact a public water supply.

The same methodology should be applied to the NCHGWC site, and it is respectfully asserted by the submitting parties that EPA should refrain from listing the site, as least as currently defined.

THE PROPOSED LISTING WILL DISCOURAGE ECONOMIC DEVELOPMENT OF THE NCIA

EPA should also give due consideration to the negative economic impacts and chilling effect to positive development that may result from an ill-advised designation of the area as a federal Superfund site. The State of New York in March 2006 designated the NCIA as an Empire Zone (Nassau County Empire Zone Area 4) specifically to encourage much needed investment and job growth in this long depressed area. Furthermore, using U.S. Department of Housing and Urban Development Community Development Block Grant funds, North Hempstead's Community Development Agency (CDA) has been working for years with New Cassel community groups and talking to private developers to encourage much needed high and low residential development, commercial development (with an emphasis on supermarkets and retail shop) to upgrade and uplift the area. The unwarranted labeling of the NCIA as a federal Superfund site will undoubtedly stifle these worthy economic development goals without providing any countervailing benefit to public health or the environment.

CONCLUSION

The NPL and the HRS system are designed with equally beneficial public goals in mind – namely the preservation of scarce federal Superfund dollars for use at sites where there is risk to the public from the environmental harm assessed and the quick and efficient elimination of that risk. Here, the proposed listing of the NCHGWC site simply does not meet these goals. Simply put, the only way the EPA demonstrated any environmental harm was by manipulating or ignoring the data. Had it properly evaluated the data, EPA would have concluded that there is no justification for the NPL listing.

The submitting parties respectfully request that EPA withdraw the NCHGWC site from consideration for listing on the NPL.

ATTACHMENT A

Attachment A
Wellhead Treatment Precedent

1. **Naval Weapons Industrial Reserve Plant (NWIRP) – Bethpage, Grumman Aerospace – USEPA Region 2 Superfund Site** (<http://www.epa.gov/region02/waste/fsgrumm.pdf>)

Groundwater on-site is contaminated but it is not used as a potable water supply. A groundwater pump and treat system was implemented on-site to contain the plume and reduce contaminant concentrations in the groundwater. Off-site groundwater contamination has affected several public water supply wells and may threaten others. Grumman and the NAVY have installed wellhead treatment systems at affected public water supply wells to remove contaminants prior to distribution in the public water supply system. A Public Water Supply Protection Program was memorialized in the Operable Unit 2 Groundwater Record of Decision for this facility, issued by NYSDEC in 2001.

2. **Vestal Water Supply Well 4-2, South of Binghamton, Broome County – USEPA Region 2 Superfund Site** (<http://www.epa.gov/region02/superfund/npl/0202152c.pdf>)

Discovery of contamination in Well 4-2 in 1980 led to its removal from service. In 1988, the Town constructed an air stripping system with carbon filtration for backup. The State signed a settlement agreement with three potentially responsible parties in 1985, which outlined cleanup actions and a series of groundwater standards that must be achieved. The agreement also required the PRPs to pay the Town of Vestal \$633,000 for cleanup at the site. In addition to the installation of the carbon unit and air stripper at Well 4-2, the Town removed contaminated soils from the source area.

3. **Fairchild Republic Co., East Farmingdale, NY, – USEPA Region 2 Superfund Site – Facility EPA ID #: NYD079818555** (<http://www.epa.gov/region02/waste/fairc725.pdf>)

The selected remedy included groundwater pump and treat with a contingency to provide wellhead treatment at the downgradient public supply wells.

4. **Fair Lawn Well Field, New Jersey – USEPA Region 2 Superfund Site - EPA ID#: NJD980654107** (<http://www.epa.gov/region02/superfund/npl/0200765c.pdf>)

The Fair Lawn Well field site is comprised of three municipal wells contaminated by VOCs. The primary source of the contamination was located in Fair Lawn Industrial Park. The immediate remedial action of wellhead treatment addressed the municipal well contamination, while the long-term action will focus on the entire groundwater cleanup and controlling potential sources of contamination.

In 1984, the PRPs removed contaminated soil from a portion of their property. In 1987, the Borough of Fair Lawn installed air strippers to treat the contaminated wells. The PRPs later

reimbursed the Borough for the installation of the air strippers and provided funding for future operation and maintenance activities. Under NJDEP oversight, the PRPs have investigated their facilities. Fisher has installed cut off trenches and pumping wells at their facility to collect contaminated groundwater for on-site treatment and discharge to a publicly owned water treatment works. Sandvik has removed and disposed of soil and buried drums, and is periodically monitoring the groundwater. Kodak, under a voluntary agreement with the NJDEP, has demolished and removed several buildings on their property, and sampled the soil and groundwater.

5. Suffern Village Well Field, NY – USEPA Region 2 Superfund Site - EPA ID#: NYD980780878 (<http://www.epa.gov/region02/superfund/npl/0202277c.pdf>)

In 1978, the State detected VOCs in the municipal water distribution system. The Tempcon Corporation, a small oil burner reconditioning business, was identified as the source of the contamination. Soils also were contaminated with VOCs. The Remedial Investigation (RI) and risk assessment indicated that none of the threats were significant enough to warrant remedial action.

In 1979, the contaminated soil located at the Tempcon facility was excavated, aerated, and then backfilled. In 1979, the Village installed a system to remove pollutants in the municipal water supply by exposing the water to air to evaporate contaminants. This system was operated intermittently as needed and has been taken out of service.

6. Rockaway Borough Well Field, New Jersey - USEPA Region 2 Superfund Site – EPA ID#: NJD980654115 (<http://www.epa.gov/region02/superfund/npl/0200766c.pdf>)

Although 13 VOCs have been detected in the well water, TCE and PCE are the primary contaminants of concern. Well water is treated to drinking water standards before being supplied to the residents of Rockaway Borough. In 1981, an emergency was declared due to the groundwater contamination and the Borough installed an activated carbon water treatment system to reduce contaminant concentrations. Rockaway Borough has since upgraded its existing treatment system with the installation of an air stripper to ensure compliance with Safe Drinking Water Act standards.

EPA subsequently identified contaminant source areas, further delineated the extent of groundwater contamination, and evaluated additional alternatives for final groundwater cleanup. In a second operable unit ROD signed on September 30, 1991, EPA selected a remedial action which entails extracting and treating contaminated groundwater to restore the aquifer. Additional investigations were conducted to further delineate contamination within the immediate source areas. A September 2006 ROD for the source called for the excavation of contaminated soil and off-site disposal and/or treatment, and soil vapor extraction to address soil contamination that cannot be excavated.

7. Manfred F. J. Schulte (NYSDEC Inactive Hazardous Waste Site #130047), 405 Jericho Turnpike, New Hyde Park, NY (<http://www.dec.ny.gov/cfm/external/haz/details.cfm> - enter site #130047)

Dry cleaning operations were conducted at the site prior to 1971. Additionally, dry cleaning fluid was stored on site in steel tanks in the basement of the facility for repackaging and resale to other dry cleaning establishments. The primary contaminant of concern at the site was PCE. Contamination of the sole source aquifer beneath the site has occurred. An IRM consisting of removal of chemical storage tanks and excavation of contaminated soils was performed between 1985 and 1986. Based on the remedial investigation conducted between 1997 and 1999 a "no further action" ROD for this site was signed on March 28, 2000, which required groundwater monitoring. Nearby public drinking water supply wells are currently being treated to remove VOCs. The site was delisted in February 2003. Soil vapor intrusion is being evaluated to determine if potential residual contamination is contributing to a vapor exposure pathway.

- 8. Citizens Development Co. (NYSDEC Inactive Hazardous Waste Site #130070), 47 Northern Blvd., Great Neck, NY**
(<http://www.dec.ny.gov/cfm/externalapps/derexternal/haz/details.cfm> - enter site #130070)

The setting is primarily commercial, with strip malls and stand-alone buildings being the predominant features. Soil and groundwater was found to have been contaminated with PCE by a former dry cleaner which occupied the facility. A ROD issued in March 1998 for OU-1 required continued monitoring of shallow groundwater. OU-2 was undertaken for the purposes of evaluating deeper groundwater quality. During this time, PCE levels in shallow groundwater were found to have increased. Soil gas sampling led to the discovery of an additional on-site source area. Under an IRM contaminated soil was excavated and disposed of off-site and a soil vapor extraction system was constructed within the contaminant source area. A pre-existing OU-1 sub-slab SVES was also enhanced. A ROD issued for OU-2 in March 2006 required in-situ treatment of shallow groundwater and operation and monitoring of the two SVES. Deeper groundwater was found not to have been contaminated.

Groundwater in the area is contaminated with PCE, the dry cleaning chemical used by the facility. The Water Authority of Great Neck North (WAGNN) has public supply wells near the site which are contaminated with PCE and other volatile organic compounds (VOCs). Since 1984, WAGNN has used air stripping to remove contamination from the water prior to distribution to the community.

- 9. Fulton Avenue (Garden City Park Industrial Area) (NYSDEC Inactive Hazardous Waste Site #130073), 150 Fulton Avenue, Garden City Park, NY**
(<http://www.dec.ny.gov/cfm/externalapps/derexternal/haz/details.cfm> - enter site #130073)

The groundwater is heavily contaminated with perchlorethene (PCE) from the 150 Fulton Ave. site in addition to other volatile organic compounds (VOCs) from unidentified side-gradient sources. The contaminant plume has impacted the sole source aquifer downgradient and site-related contamination has been detected in several downgradient public water supply wells. The Village of Garden City public supply wells #13 and #14 are impacted. The treatment system for these wells was upgraded in 2004 to accommodate the increasing

contamination. Other affected downgradient wells are either treated to meet drinking water standards or are off-line.

A soil vapor extraction/air sparging system IRM operated at the site from 1998 until December 2001. The 150 Fulton Ave. facility and its associated plume of contaminated groundwater are referred to as OU-1. The OU 1 ROD calls for groundwater extraction and treatment, in-situ chemical oxidation for the source area and wellhead treatment for the village of Garden City. The USEPA will conduct an OU 2 RI/FS to identify any additional sources of groundwater contamination from the unidentified side-gradient source(s) of TCE impacting the Franklin Square Water District.

10. 101 Green Acres Road Site (NYSDEC Inactive Hazardous Waste Site #130084), 101 Green Acres Road, Valley Stream, NY
(<http://www.dec.ny.gov/cfm/external/haz/details.cfm> - enter site #130084)

Bulova Industries operated a manufacturing facility at this location and spills or releases of solvents resulted in the contamination of on-site soil. Groundwater at the site is contaminated with VOCs. Excavation activities were undertaken to remove contaminant sources from the site and the groundwater was monitored for a period of time. A no further action ROD was issued in March 2000. Off-site groundwater does not indicate migration of the contaminants from the site. The nearest downgradient public water supply well is treated to remove VOCs from another unrelated source.